SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 866

TWISP MINING & SMELTING COMPANY, A CORPORATION,

Appellant,

vs.

CHELAN MINING COMPANY, A CORPORATION; SEATTLE-FIRST NATIONAL BANK, ACTING THROUGH ITS SPOKANE & EASTERN BRANCH, AS RECEIVER OF THE ALDER GROUP MINING & SMELTING COMPANY, A DEFUNCT CORPORATION; AND METHOW GOLD CORPORATION, A CORPORATION,

Appellees.

MOTION

Comes now the Appellant, Twisp Mining & Smelting Company, out of abundance of caution, under the provisions of Section 237 (c) of the Judicial Code of the United States and moves this Honorable Court in the event that this Honorable Court takes the position that the appellant's appeal was improvidently allowed by the Chief Justice of the State Supreme Court on November 20, 1944, to treat the papers whereon the appeal was allowed by the State Supreme Court as a petition for certiorari and as if presented to this Court at the time they were presented to the

judge who allowed the appeal on the grounds and for the following reasons, to-wit:

The Foregoing Motion is based on the grounds that the Judgment and Decree of the Superior Court of Okanogan County, State of Washington and the affirmance thereof by the State Supreme Court was the result of a deliberately planned and carefully executed scheme to defaud the Trial Court and the State Supreme Court by the knowing use of perjured testimony and fraudulent representations to fraudulently obstruct and defeat the due administration of justice in the manner indisputably shown in the Motion herein which involves far more than an injury to a single litigant, for it was the perpetration of a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated with the good of society.

Section 237(c) of Judicial Code of the United States provides:

> "If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted upon as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed."

In *Longest* v. *Lanford*, 274 U. S. 499, 71 Law Ed. 1170, this Court stated the law governing the above statute, as follows:

> "The writ obviously was improvidently allowed. This case falls within the class where a review in this Court may be had only on petition for certiorari under section 237 (b) of the Judicial Code. The distinction is important, has a real purpose and should be given effect by all who are invested with authority to allow writs of

error running from this court to a state court. A failure to observe it may subject the party suing out the writ to damages and double costs (Rev. Stat. Sec. 1010; Judicial Code, Sec. 237 (c); U. S. Code, Title w8, section 344) and result in harm embarrassmenr to the other party. Of course where the writ is improvidently allowed the other party may move in this court to dismiss it. But in actual practice this does not operate as an adequate corrective, for the action of the judge in allowing the writ usually is assumed to be advisely taken. In the present case the fact that the allowance was improvidently escaped the notice of the parties for a full year. While we cannot take jurisdiction on the writ of error so improvidently allowed, we can, under section 237 (c) of the Judicial Code, treat the papers whereon the writ was allowed as a petition for certiorari and as if presented to this Court at the time they were presented to the judge who allowed the writ. The papers have been examined under that section; and we are of the opinion that, treating them as a petition for certiorari, they disclose a case and situation in which the petition should be granted. Writ of error as such dismissed, but as petition for certiorari granted."

This Court on similiar cases in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 88 U. S. Law Ed. Advance Opinions 936, and *Shawkee Mfg. Co.* v. *Hartford-Empire Co.*, 88 U. S. Law Ed. Advance Opinions, 954, granted reviews on Writs of Certiorari and it would seem that this Court should grant the present motion in the event that the Court deems the appeal was improvidently allowed and protect and safeguard the public from a repetition of such actions that are disclosed in this instant case for these appellees are faced with the rule of law their acts cannot be tolerated consistently with the good order of society.

In *Roach* v. *McDonald*, 275 U. S. 449, 72 L. Ed. 365, there was a judgment entered in the Superior Court of Spokane County, State of Washington in favor of Mr. Roach, and the

laws of the State of Washington, under Sections 459 and 460, provided that such judgment could not be collected unless the collection was completed within six years from the date of the judgment; Mr. Roach, however, brought an action on said Judgment in the State of Oregon, and obtained another judgment against McDonald and then came back to Washington and sought to obtain another judgment against McDonald by virtue of the Oregon Judgment and the Washington Court denied Roach any judgment and the State Supreme Court construed sections 459 and 460 of the Washington statutes to provide that Roach could not be granted full faith and credit on his Oregon Judgment and the case was appealed to this Court and this Court denied the Appeal held:

> "This writ of error (or appeal) is dismissed for want of jurisdiction, but since the papers show adequate reason for invoking a review by a petition for writ of certiorari and that will be granted." The U. S. Supreme Court reversed the State Supreme Court in this case.

Appellant respectfully submits that in the event that this Supreme Court of the United States takes the position that the Chief Justice of the State Supreme Court improvidently allowed the appeal, that the Supreme Court of the United States should grant appellant a review of this cause on a writ of certiorari pursuant to the provisions of Section 237 (c) of the Judicial Code of the United States and grant the appellant the relief prayed for in accordance with the law of the land.

LUCIUS G. NASH,
Attorney for Appellant.